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Supreme Court, U.S.
FILED
MAR 2 4 2004
OFFICE OF THE CLERK

Case No. 03-1196

IN THE SUPREME COURT OF THE UNITED STATES

JOHN D. FREEMAN,

Petitioner,

vs.

JAMES V. CROSBY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether certiorari review should be granted on a claim only presented to the state court in a motion for rehearing?

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Case No. 03-1196

IN THE SUPREME COURT OF THE UNITED STATES

JOHN D. FREEMAN,

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Respondent.

OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Freeman v. State*, 852 So.2d 216 (Fla. 2003).

JURISDICTION

The opinion issued on July 11, 2003. Petitioner filed a motion for rehearing raising the *Ring* issue on October 31, 2003. The Florida Supreme Court denied the motion without comment on November 25, 2003. The mandate issued on December 29, 2003. The petition for writ of certiorari was filed on February 20, 2004. The petition was timely. *See* Sup. Ct. R. 13.1; 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

The facts, as set forth in the Florida Supreme Court's opinion, are as follows:

> John D. Freeman (Freeman) was convicted of first-degree felony murder for the 1986 killing of Leonard Collier (Collier). Freeman was sentenced to death, and both the conviction and sentence were affirmed on appeal. *See Freeman v. State*, 563 So. 2d 73 (Fla. 1990). Collier caught Freeman in the act of burglarizing his home. Freeman claimed that Collier pointed a gun at him and threatened to shoot him to prevent his escape. The two struggled over the gun and fell outside into the front yard. When Freeman obtained possession of the gun, he used the gun to repeatedly strike Collier in the head ten to twelve times. Collier died from the head wounds.
>
> The Collier murder was the second murder that Freeman committed within twenty-two days. The first murder was committed in a similar manner--the victim, Alvin Epps (Epps), came home to find Freeman burglarizing his home and Freeman stabbed him to death. In the Epps case, Freeman was convicted of first-degree murder, the jury recommended a life sentence, the judge overrode the jury recommendation, and this Court reversed the override. *Freeman v. State*, 547 So. 2d 125 (Fla. 1989).

Freeman v. State, 858 So. 2d at 321-322.

In his brief to the Florida Supreme Court, in the post-conviction appeal of his 3.850 motion following a remand, Freeman

raised five issues: (1) did the prosecutor's refusal to plea bargain in a case where the defendant was white and the victims were African-American violate equal protection; (2) whether defense counsel was ineffective for failing to file a motion to preclude the death penalty based on the reverse *McCleskey* claim; (3) was trial counsel ineffective at penalty phase for failing to present additional mitigating evidence; (4) was trial counsel ineffective for failing to provide the mental health expert with records; and (5) was trial counsel ineffective for failing to subpoena a mitigating witness. The Florida Supreme Court addressed these claims in its opinion. *Freeman v. State*, 852 So.2d 216 (Fla. 2003). No issue regarding *Ring v. Arizona*, 536 U.S. 584 (2002) was raised by petitioner at this stage or addressed by the Florida Supreme Court. Freeman's new counsel filed a motion for rehearing on October 31, 2003, which raised, for the first time, a claim that Freeman's death sentence violated *Ring*. The State, in its response to the motion for rehearing, pointed out that this was a new issue that had not previously been raised in briefs and therefore, was not properly raised in the motion under Florida law. Alternatively, the State argued that *Ring* was not retroactive. The Florida Supreme Court denied the motion for rehearing without addressing the *Ring* issue.

ARGUMENT

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW A CLAIM ONLY PRESENTED TO THE STATE COURT IN A MOTION FOR REHEARING?

Petitioner's *Ring* claim was not properly presented in state court. Freeman did not assert that his death sentence violated the Sixth Amendment until his motion for rehearing. As this Court has stated:

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. *See Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).
>
> * * * *
>
> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Adams v. Robertson, 520 U.S. 83, 86-87 (1997)(holding certiorari was improvidently granted because the federal constitutional issue was never presented to state Supreme Court). Here, Petitioner seeks review of an opinion which makes no mention of his claim that Florida's capital punishment statute violates *Ring*. This is so because Petitioner did not raise this issue before the Florida Supreme Court until he filed his motion for rehearing. This Court has held that the failure to raise a constitutional claim until a motion for rehearing is insufficient to carry a petitioner's burden of showing that the issue was properly presented. *Adams*, 520 U.S. at 89 n.3 (refusing to consider federal constitutional issue raised for the first time in a petition for rehearing before the Alabama Supreme Court when the state supreme court was silent on the question); *Rotary Club of Duarte*, 481 U.S. at 550 (observing that when a court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation where the party did not present the issues squarely to the court until they filed their petition for rehearing which was denied without opinion). This assumption should apply with equal force here. Pursuant to Florida Rule of Appellate Procedure governing motions for rehearing, rule 9.330(a), "[a] motion for rehearing shall state with particularity the points of law or fact that in the opinion of the movant the court had overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding." (emphasis added). Under these circumstances, it cannot fairly be said that the Florida Supreme Court ignored its own rules of procedure and considered this claim on the merits *sub silentio*. As such, this Court should not grant certiorari on this issue.

Nor does the summary denial of the motion for rehearing conflict with the decision of any other state court of last resort or any decision of any federal court of appeals. The rule addressing considerations governing review on certiorari provides that this Court will consider exercising its certiorari jurisdiction when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last

resort or of a United States court of appeals. Sup. Ct. R. 10(b). Of course, a summary denial of a motion for rehearing based on a state appellate procedural rule cannot conflict with any other decision of any other state or federal circuit court.

Moreover, respondent maintains that *Ring* should not be applied retroactively under the test set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Nevertheless, even if Petitioner could show that this issue had been properly presented and decided by the Florida Supreme Court, and *Ring* is held to be retroactive by this Court,[1] Freeman is still not entitled to relief. Freeman was death eligible upon conviction. Freeman had previously been convicted of the crimes of first-degree murder, armed robbery, and burglary to a dwelling with an assault. *See Freeman v. State*, 563 So.2d 73, 75 (Fla. 1990).

Freeman argues that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) does not allow a judge to find a prior conviction exists when that finding is used as an aggravator in a capital case. Petitioner did not present this particular claim even in his motion for rehearing. In his motion for rehearing, Freeman acknowledged that the judge was allowed to find the prior violent felony aggravator. No such argument was presented to the Florida Supreme Court at any time.

Almendarez-Torres is still valid law in the wake of *Apprendi* and *Ring*. In *Apprendi*, this Court exempted "the fact of a prior conviction" from its requirement of a jury finding of any fact that increases the penalty beyond the statutory maximum. *Apprendi*, 530 U.S. at 490. Although this Court extended *Apprendi* to capital cases in *Ring*, *Ring* did not involve the prior violent

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[1] The issue of the retroactivity of *Ring* is currently pending in this Court. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted, sub. nom. Schriro v. Summerlin*, 124 S. Ct. 833 (Dec. 1, 2003)(No. 03-526); But see *Turner v. Crosby*, 339 F.3d 1247, 1279-1286 (11th Cir. 2003)(concluding that *Ring* was a new procedural rule that did not meet either of the two exceptions in *Teague v. Lane*, 489 U.S. 288 (1989)).

felony aggravating circumstance, and therefore, this Court did not address the *Almendarez-Torres* exception. *Ring*, 536 U.S. at 597 n. 4. *Almendarez-Torres* is still valid law and no court has held otherwise. Petitioner's dissatisfaction with the holding in *Almendarez-Torres* does not compel certiorari review; this Court continues to acknowledge *Almendarez-Torres* and its long-standing principle that recidivism has long been recognized as a legitimate basis for increased punishment. *See Ewing v. California*, 538 U.S. 11, 25 (2003); *Harris v. United States*, 536 U.S. 545, 553 (2002). Given this Court's reluctance to overrule existing precedent absent special justification, *see Harris*, 536 U.S. at 557, and the lack of any such justification in the certiorari petition, review of this issue must be denied.

Exempting recidivism from the holding in *Apprendi* is logical. A defendant is entitled to one jury trial, not two. Frank R. Herrmann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175 (1998)(explaining that recidivism should be exempt from the elements rule because the defendant has already received a full trial and due process for the prior conviction and observing that the prior conviction received "the totality of constitutional protections" which distinguishes the use of prior convictions from other sentence enhancers and concluding that requiring full trial rights for the prior conviction would be "redundant".) Any defendant, who is a recidivist, has already had a jury find the underlying facts of the prior conviction at the highest standard of proof. The judge, in a recidivist situation, is merely taking judicial notice of a prior jury's verdict.

Furthermore, the vast majority of criminal defendants plead. These defendants waived the right to a jury trial. If *Almendarez-Torres* is overruled, a defendant will have resurrected his right to a jury trial, that he waived when he pled, by the act of committing a second offense Overruling *Almendarez-Torres* would create the odd result of unwaiver by criminal conduct. Moreover, the prosecution often agrees to a plea to avoid the time and trouble of a trial. For the prosecution to have to prove a crime

years after it was committed, with all the attendant problems of lost evidence, missing witnesses and foggy memories, because the defendant committed another crime, seems to be a breach of the original plea agreement.

Petitioner also asserts, for the first time in this Court, that the weighing of aggravating circumstances versus mitigating circumstances must be performed by the jury, not the judge. Freeman presented no such claim in state court. In his motion for rehearing, Freeman implicitly acknowledged that weighing could be performed by the judge.

A judge, sitting without a jury, may perform the weighing. Weighing is not a fact; rather, it is a judgment.[2] As Justice Scalia noted in *Ring*, the judge may be the ultimate sentencer in a capital case. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . ."). A judge may perform the weighing.

This Court should not grant review of a claim not properly presented to the state Supreme Court, parts of which are presented for the first time in this Court. Nor should this Court grant review of a summary denial of a motion for rehearing that does not conflict with any other case. While the issue of the retroactivity of *Ring* is

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[2] *Oken v. State*, 835 A.2d 1105, 1121-1122 (Md. 2003)(rejecting a claim that *Ring* requires the jury to do the weighing and explaining that a judge may, without a jury, conduct the weighing process because it "is purely a judgmental one," of balancing the mitigators against the aggravators to determine whether death is the appropriate punishment and this process is "not only traditionally, but quintessentially is a pure and Constitutionally legitimate sentencing factor" and concluding that *Ring* does not pertain to the selection phase); *Ex parte Waldrop*, 859 So. 2d 1181, 1188-1189 (Ala. 2002)(rejecting a claim that *Ring* requires the jury to do the weighing, reasoning that the weighing process is not a factual determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment that takes into account a theoretically limitless set of facts).

obviously worthy of certiorari review, this particular case is not because the Florida Supreme Court never addressed the retroactivity of *Ring* in its denial of the motion for rehearing and *Ring* did not change Florida sentencing law. Review is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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On Petition for Writ of Certiorari To
The Supreme Court of the State of Florida

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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"CAPITAL CASE"

QUESTION PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Should this Court hear Mr. Freeman's claims involving *Ring v. Arizona*, 536 U.S. 584 (2002), on certiorari review?

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28 U.S.C. § 1257 (a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States 2

Fla. R. App. Proc. 9.330 (a):

"[a] motion for rehearing shall state with particularity the points of law or fact that in the opinion of the movant the court had overlooked or misapprehended in its decision, and shall not present the issues not previously raised in the proceeding." 6

Sup. Ct. R. 24.1 (a):

The question presented for review under Rule 14.1 (a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the question presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may mot raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide 10

CONSTITUTIONAL PROVISIONS

Article III § 2 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--...

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section 1 of the United States Constitution Provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under Article III § 2 of the Constitution of the United States and 28 U.S.C. § 1257 (a). This brief on the merits is brought pursuant to Supreme Court of the United States Rule 24.

STATEMENT OF THE CASE

Mr. Freeman was convicted of first degree murder in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, State of Florida and sentenced to death. The Florida Supreme Court affirmed the conviction and

sentence on direct appeal.[1] The United States Supreme Court denied certiorari review in 1991.[2] Mr. Freeman filed a motion for post conviction relief in state circuit court pursuant to Fla. R. App. Proc. 3.850. That motion was denied. Mr. Freeman appealed the denial of that motion to the Florida Supreme Court and filed a brief in support thereof on April 11, 2002. This Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), on June 24, 2002. Mr. Freeman's post-conviction appeal was denied on July 11, 2003.[3] Mr. Freeman filed a timely Motion for a Rehearing in the Florida Supreme Court and raised additional claims citing the *Ring* decision.[4] The State filed a Response[5] to the Motion for a Rehearing in which it addressed the merits of the *Ring* arguments. Mr. Freeman then filed a motion in the Florida Supreme Court, requesting that he be allowed to file a reply brief to the State's Response, or in the alternative to permit oral arguments.[6] The Florida Supreme Court denied Mr. Freeman's motion for a rehearing without opinion.[7]

ARGUMENT

This Court should review Mr. Freeman's *Ring* based claims because policy considerations for abstention are not applicable in this case and fundamental error occurred at his trial proceeding.

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[1] *Freeman v. State*, 536 So. 2d 73 (Fla. 1990).
[2] *Freeman v. Florida*, 501 U.S. 1259 (1991) (Cert. denied).
[3] *Freeman v. State*, 858 So. 2d 319 (Fla. 2003).
[4] See, *Appendix 1.*
[5] See, *Appendix 2.*
[6] See, *Appendix 3.*
[7] *Freeman v. State*, 2003 Fla. Lexis 2078 (Fla. 2003).